STATE OF MICHIGAN

IN THE SUPREME COURT

AMERICAN ALTERNATIVE INSURANCE COMPANY, INC., a New York Corporation, Individually, and as Subrogor of DVA AMBULANCE, INC.,

Plaintiffs/Appellants,

v

DONALD JEFFREY YORK,

Defendant/Appellee.

/

Supreme Court No. 121968

Court of Appeals No. 227917
Lower Court No. 98-2851-CK
Shiawassee County

121968

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PLAINTIFFS-APPELLANTS' REPLY BRIEF ON APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

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ARGUMENT

Herein, Plaintiffs/Appellants rely on the content of their Application for Leave to Appeal. However, in reply to Defendant/Appellee's response to the Application for Leave to Appeal, Plaintiffs/Appellants wish to make two brief points:

I. NECESSITY FOR SUPREME COURT CONSIDERATION

Plaintiffs/Appellants' Application for Leave to Appeal addresses in detail the necessity for clarification of this issue by the Michigan Supreme Court. One of the main points stressed by Plaintiffs/Appellants is that the most recent Court of Appeals determination in the above-captioned case convolutes the definition of willful and wanton, intentional, and reckless, and leaves the parties with no clear definition of what would satisfy "intentional" under MCL 500.3135(3). This confusion is illustrated by Defendant/Appellee's interpretation of the Court of Appeals decision. In his brief in response to the application, Defendant/Appellee indicates that the Court of Appeals "correctly determined that the Trial Court erred when it judged York's conduct for purposes of [sec] 3135(3)(a) by a 'willful and wanton' misconduct standard that did not reflect the 'intentionally caused harm' standard the Legislature expressly declared in [sec] 3135(3)(a)." (Defendant/Appellee's Brief, p. 10).

This is not what the Court of Appeals' decision states. In the case at hand, the Court of Appeals determined that "willful and wanton" can mean the same as "intentional", triggering the exception contained in §3135 of the No-Fault Act.

However, the court also held that at the same time, "willful and wanton" can merely take on a meaning of "recklessness" which the Court of Appeals in this opinion, determined did not sufficiently rise to the level of "intentional" to trigger the exception found in §3135(3). The court also found that York's conduct of: 1) setting up a prior designated driver plan (because he intended to drink); 2) acting on that plan to the extent that he called his wife to the bar recognizing that he had consumed an immoderate amount of alcohol; and, 3) subsequently making the conscious decision to abandon the plan, drive, and disregard a stop sign, which resulted in a collision causing the death of Mr. Coats, could be sufficiently "reckless" to fall under the definition of "willful and wanton conduct". However, even though making a determination that the conduct was willful and wanton, the court indicated that it did not sufficiently rise to the level of "intentional" to trigger the exception found in §3135(3).

The Court of Appeals created a dual definition of "willful and wanton", one of which satisfies the burden of §3135. This dual definition creates great confusion as illustrated by Defendant/Appellee's brief and renders consistent decision making impossible under §3135.

Moreover, the most recent decision issued by the Court of Appeals, in the case at hand, creates an impossible standard by which to judge application of §3135. Future courts will be forced to make a case by case determination of whether the acts of the tortfeasor are sufficient to rise to the level of a "willful and wanton" conduct which is sufficient to render it "intentional" as opposed to simply

"willful and wanton/reckless" behavior. The ruling of the Court of Appeals in the case at hand creates a totally impractical standard for future application by courts.

As such, this case necessitates determination by the Supreme Court to clarify the application of this exception found in MCL §500.3135(3)(a).

II. THE COURT OF APPEALS ERRED IN REVERSING THE TRIAL COURT AND DETERMINING THAT MR. YORK'S CONDUCT WAS "WILLFUL AND WANTON" BUT NOT OF THE NATURE TO SATISFY THE "INTENTIONAL" HARM REQUIREMENT FOUND IN MCL 500.3135(3).

In response to Plaintiffs' Application for Leave to Appeal, Defendant/Appellee looked to the second sentence of the statute in support of their argument. This portion reads as follows:

> Even though a person knows that harm to persons or property is substantially certain to be caused by his or her act of omission, the person does not cause or suffer that harm intentionally if he or she acts or refrains from acting for the purpose of averting injury to any person... MCL §500.3135(3)(a)

Defendant argued that by use of this specific language "the legislature would have no cause to expressly immunize from liability a person that acts 'know[ing] that harm ... to property is substantially certain in the limited circumstance provided if the statute otherwise did not contemplate such liability generally." (Defendant/Appellee Brief, p. 11). In looking at the language as a whole, this argument does not make sense. The point of the second sentence in this statute is to immunize a person who is acting "knowingly" but in an effort to avert injury

to a person. In fact, this language supports Plaintiffs' position in that it seems to define intentional as knowing harm is substantially likely to occur. This carves an exception to the exception and helps define what is meant by intentional. This corresponds to the definition of willful and wanton set forth in case law.

Moreover, Defendant relied on Beauchamp v Down Chemical Co., 427 Mich 1; 398 NW2d 882 (1986), to make the argument that the verbiage "substantial certainty" equates with Defendant's interpretation of the statute and "intentional" as used therein. Defendant argued that substantial certainty is the accepted "true intentional tort" standard. The Beauchamp court adopted the words "substantial certainty" to help define the intentional tort exception to employer liability under the Michigan Workers' Compensation statutes. Id.

However, Defendant fails to note that subsequent to Beauchamp, the Michigan Legislature amended the Workers' Compensation statutes to overrule Beauchamp. See Gray v. Morley, 460 Mich 738; 596 NW2d 922 (1999). Specifically, the Gray court pointed out that the Legislature "rejected the 'substantially certain' test previously announced by this Court in *Beauchamp v Dow Chemical*, 427 Mich 1; 398 NW2d 882 (1986), and adopted the more rigorous "true intentional tort" standard as the proper test for determining the presence of an intentional tort." Gray, 460 Mich at 742, n 2. This illustrates that "substantial certainty" is a lesser standard/burden. Moreover, the fact that the Legislature amended the Workers Compensation Act illustrates the Legislature's awareness of the differing definitions of intentional. Therefore, when the

Legislature placed the words "substantially certain" in §3135(3)(a), the Legislature clearly intended a lesser standard to be applied to this section. As noted in Williams v Organic Chemicals, Inc., 1997 WL 33349383 (1997), "substantial certainty" means less than absolute certainty. (See, attached **Exhibit 1**). Consequently, the Legislature's use of the term "substantially certain" in the second sentence of §3135(3)(a) to define the terms in the first sentence--which is applicable herein--indicates the Legislature's intent to employ a lesser standard to define "intentional" under this section. As such, neither the trial court nor the Court of Appeals was engrafting a new standard but were instead, utilizing language, which conveyed the same meaning: - intentional conduct. As such, the Court of Appeals and the trial court's decision in this respect were proper in that they recognized that willful and wanton conduct equates with intentional under §3135.

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